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NO. 71 - 160

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

LEVIN SERVICE CO., et al.,
Petitioners,

v.

DAVIDSON EXCAVATING, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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NO. ———

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v.

DAVIDSON EXCAVATING, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

Petitioners respectfully petition this court for a writ of certiorari to review the final order and judgment of the Supreme Court of Ohio, entered on March 31, 1971, denying petitioners' timely petition for rehearing, and its final order and judgment entered on March 3, 1971, denying the appeal of petitioners without opinion.

An extension of time to file this petition was granted by this court until July 30, 1971, by an order dated June 28, 1971.

The opinion of the Ohio Second District Court of Appeals rendered August 25, 1970 is not reported, and is appended hereto at Appendix, pages 20-29. No opinion was rendered by the Supreme Court of Ohio, the highest Court in the State. Its orders denying the appeal of pe-

titioners entered on March 3, 1971, and its order denying petitioners' petition for rehearing, entered on March 31, 1971, are appended hereto at Appendix, pages 34 and 36.

This case involves a suit against the Petitioners for money damages. The primary issue raised here is whether Petitioners have been deprived of their rights under Section One, of the Fourteenth Amendment to the United States Constitution, guaranteeing due process of law.

The facts are undisputed that the jury was not charged by the trial court on the issue of "Joint Enterprise" under which doctrine the joint liability verdict of the jury for $26,734.21 was sustained by the Court of Appeals. The pleadings of the Respondent did not charge Petitioners with liability by reason of "joint enterprise"; nor was this an issue at the trial of the cause. No opportunity under the pleadings was given to Petitioners to prepare their case against this ground of liability, which was the only ground of liability upon which the Court of Appeals found the joint liability of Petitioners to rest. Neither side requested the trial court to charge the jury on this issue, nor did the trial court do so in its charge.

The "Joint Enterprise" doctrine has not been defined by the Ohio Supreme Court, nor by the Court of Appeals itself. It is not identical with "joint adventure", which has been defined by the Ohio Supreme Court. *31 Ohio Jurisprudence 2d 318, § 2; 30 American Jurisprudence 940, § 2. Ford* v. *McCue,* 163 O.S. 198, 127 N.E.2d 209. In either event, the jury was not charged on the ground of joint liability by reason of "joint adventure" or "joint enterprise". The verdict of joint liability cannot be sustained on any other ground.

It is respectfully submitted that Petitioners were denied a trial by jury under due process of law.

The judgment of the Supreme Court of Ohio sought to be reviewed was dated and entered on March 3, 1971, and a timely petition for rehearing was denied March 31, 1971.

The jurisdiction of this Court to consider the Federal Constitutional issues is conferred by Title 28, Section 1257 (3).

We submit that the following cases sustain the jurisdiction of the Supreme Court to review the judgment in this case:

(1880) *Williams* v. *Bruffy,* 102 U.S. 248, 26 L. Ed. 135
(1945) *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, 89 L. Ed. 1252, 65 S.Ct. 870
(1937) *Honeyman* v. *Hanan,* 300 U.S. 14, 81 L. Ed. 476, 57 S.Ct. 350

The questions presented by this appeal are as follows:

A. Have petitioners been deprived of their right to due process of law under Section One of the Fourteenth Amendment to the Constitution of the United States under the following undisputed facts:

1. That the only ground upon which the appellate court sustained the verdict of the jury, as to the joint liability of the petitioners for $26,734.21, was that of "Joint Enterprise", under which doctrine:

a. The jury was not charged by the court, nor did either side request the court to so charge the jury.

b. The pleadings contained no such issue (of joint enterprise) and no such issue was tried in the trial court to the jury.

c. Petitioners did not have the opportunity to prepare their defense to this issue, of which they were not apprised in the pleadings.

d. The appellate court did not define this doctrine[1] (of joint enterprise) nor has it been defined by the Supreme Court of Ohio relative to a business transaction, as opposed to a negligence action.

B. Have petitioners been deprived of their right to due process of law under the Fourteenth Amendment to the Constitution of the United States, wherein their joint liability has been determined in the Appellate Court solely by changing the theory of liability under which the case was tried in the trial court?

AUTHORITIES IN SUPPORT OF QUESTIONS PRESENTED BY APPEAL

We submit the following authorities in support of the questions presented by this appeal.

---

[1] The appellate courts definition of "Joint Enterprise" was by reference to an entire chapter of a law digest, 31 Ohio Jurisprudence 317-331, consisting of fifteen sections. The only reference to this doctrine occurred at page 319 of this law digest, which stated that it was not identical with "Joint Adventure", which it defined as a partnership for a single transaction. It held that "joint enterprise" was employed solely in negligence actions where the parties are engaged in a unity of pursuit for a pleasure or non-business purpose, such as a fishing excursion for example, and the negligence of one may be imputed to the others. This section of 31 Ohio Jurisprudence 319, refers the reader by footnote to 30 American Jurisprudence 940, where the same language is employed in great part, emphasizing that "joint enterprise" is a negligence doctrine relating to a non-business or pleasure pursuit, and is not identical with "joint adventure".

1. May liability be determined in the Appellate Court by changing the theory of liability from that under which the case was tried?

In Headnote 6, of *Virginia Railway Co.* v. *A. J. Mullen,* 271 U. S. 220, 70 L. Ed. 915, 46 S.Ct. 526 (1926), we find:

> "A plaintiff cannot, on appeal change to a theory of liability which because of the pleadings and method of trial, defendant was not called upon to meet in the trial court."

In *Shook* v. *Beals,* 96 California Appellate 2d 963, 217 P 2d 56, 18 A.L.R. 2d 919, the court holds,

> "It is well settled that the theory upon which a case is tried in the court below, must be adhered to on appeal." *"Hayward Lumber & Inv. Co.* v. *Ford,* 64 California Appeal 2d 346, 354; 148 P 2d 689, *Merrill* v. *Kohlberg,* 29 Cal Appeal 382, 386, 155 P 824."

At 3 American Jurisprudence 35, Sec. 253, Appeal & Error, we find,

> "It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review."

An exception to the above rule has been made in some cases where the newly advanced theory involves only a question of law arising upon the proved or admitted facts, and is finally determinative of the case. 3 American Jurisprudence 37, Appeal & Error Sec. 253.

This exception is not present in this case for the reason that the doctrine of "joint enterprise" has never been defined in Ohio with reference to an action involving a business relationship, as distinguished from "joint adventure". Its only use has been employed in negligence actions

with reference to a unity between persons in the joint prosecution of a common purpose, under such circumstances that the negligence of one in the management thereof, will be imputed to the others. 39 Ohio Jur. 2d 679, Sec. 116, Negligence, (B) Joint Enterprises.

The Ohio appellate court's opinion referring to 31 Ohio Jurisprudence 2d, 317-331, Joint Adventurers, for definition of its ground of joint liability under "Joint Enterprise" demonstrates conclusively that the court was distinguishing this term (Joint Enterprise) from "Joint Adventure".

The only reference to the doctrine of "Joint Enterprise" in the chapter referred to by the Ohio Appellate Court, 31 Ohio Jurisprudence 317-331 is at page 319, where the author specifically points out that the doctrine of "Joint Enterprise" is not identical with "Joint Adventure". We quote this language,

> "Although the terms 'joint adventure' and 'joint enterprise' are used interchangeably in some instances, this is an indiscriminate use. The latter term is normally employed, not with reference to a business relationship comparable to a partnership, but by way of representing merely a unity between persons in the pursuit of a common purpose."

30 Am. Jur. 940, Joint Adventure, Sec. 2, is referred to in this distinction between "Joint Adventure" and "Joint Enterprise", in footnote 9.

The language found therein is as follows:

> "The term, joint enterprise, has been defined as an undertaking for the mutual benefit or pleasure of the parties; and it has been said that no legal distinction exists between the phrases, 'joint enterprise' and 'the prosecution of a common purpose'. Although the terms 'joint adventure' and 'joint enterprise' will be found to have been used interchangeably in some instances, this is an indiscriminate use. The latter term

> is normally employed, not with reference to a business relationship comparable to a partnership, but by way of merely representing a unity between persons in the pursuit of a common purpose, as a result of which the negligence of one participant may be imputed to another."

Under footnote 15 at page 940, of 30 American Jurisprudence, Joint Adventures, which is indirectly referred to by the appellate court in its reference to 31 Ohio Jurisprudence 317-331, which refers to 30 American Jurisprudence 940, in its footnote 9, we find the following distinction between "joint adventure" and "joint enterprise".

> "The term 'joint adventure' applies to associations for mutual profit; the term 'joint enterprise' applies to undertakings for the mutual benefit or pleasure of the parties."
>
> *Shook* v. *Beals,* 96 Cal. App. 2d 963, 217 P. 2d 56, 18 ALR 2d 919.

Inasmuch as "joint enterprise" is not identical with "joint adventure", and is not normally employed with reference to a business relationship, this doctrine cannot apply to the facts of this case as a matter of law. We must conclude that the appellate court had this distinction in mind in referring to a description of this doctrine in 31 Ohio Jurisprudence 317-331, which specifically makes such distinction.

Have Petitioners been denied due process of law under the 14th Amendment to the Federal Constitution wherein no instructions were given to the jury on the ground of joint liability by reason of "joint enterprise" which the appellate court found was the only ground applicable?

We submit that it is fundamental to due process of law that each juror must be instructed on the issues and the law applicable thereto, in order to render a fair and just

verdict. Otherwise verdicts may be determined on the basis of the need of litigants, sympathy for one litigant over another, etc. This rule is supported in *Pleasants* v. *Fant,* (1875) 22 Wall 116, 22 L. Ed. 780, where the court speaking thru Justice Miller held,

> "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his rights in the conduct of a trial. This is done by making plain to them, the issues they are to try, by admitting only such evidence as is proper to those issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied . . ."

Also, *Rowell* v. *Vershire,* 62 Vt. 405, 19A. 990, 8 L.R.A. 708,

> ". . . it is well settled, that without request, the court is bound to charge upon every branch of the case."

The instructions of the Court in their entirety are found at Appendix pp. 40-58.

Have petitioners been denied due process of law when they are not apprised under the pleadings, of the ground of liability, as found by the Court of Appeals, against which they must make their defense?

In Headnote 6. of *State* v. *Rose,* (1926) 33 Del. 168, 132 A 864, 45 A.L.R. 85, we find that due process requires pleading of the facts in issue.

Headnote 6.

> "The words 'law of the land' or 'due process of law' when used in considering the property rights of individuals, mean summons or notice, such as is ordinarily given upon the institution of a suit, due appearance

> of the parties in interest, pleading of the facts in issue, and a determination thereof by a jury."

Also at page 91, *State* v. *Rose,* 33 Del. 168, 132 A 864, the court holds,

> "In the famous case of *Dartmouth College* v. *Woodward,* 4 Wheet 518, 4 L. Ed. 629, Daniel Webster gave this explanation of the meaning of the words, 'the law of the land': By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

In *Jensen* v. *Union Pacific Railway Co.,* (1889) 5 Utah 253, 4 L.R.A. 724, the court discusses the origin and history of the due process clause of the 14th Amendment to the Federal Constitution, which the court quotes:

> 'Nor shall any State deprive any person of life, liberty or property, without due process of law.'
>
> "The origin and history of this quotation is not in dispute. It is taken from the Magna Carta, and in exact language is as follows:
>
> 'That no man shall be taken or imprisoned, or of his free hold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.'
>
> "For more than 600 years this law has been the sheet-anchor of the liberty of the English Speaking people."
>
> "Lord Coke at an early day gave to the phrase 'law of the land' an interpretation which has never been departed from, but adopted by all subsequent judges and writers. He said it meant 'due process of law'."

"This definition as has been seen has been adopted into our Constitution. Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day in court, — trial; which means the right of each party, plaintiff and defendant to introduce evidence to establish his right to recover on one hand, and to establish his defense upon the part of the other, after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law'."

At 6 R C L 453, Sec. 449, we find:

". . . due process of law not only requires that a party shall be properly brought into court but that he shall have the opportunity when in court to establish any fact, which, according to the usages of common law or provisions of the Constitution, would be a protection to his property or his liberty. Due process of law clearly implies the right of the person affected thereby to be . . . heard by testimony or otherwise and to have the right of controverting by proof every material fact which bears upon the question or right in the matter involved."

In *Moore Ice Cream* v. *Rose,* 289 U.S. 373, 77 L. Ed. 1265, 53 S.Ct. 620, Justice Cardozo, speaking for the Court said,

"Due process requires there be an opportunity to present every available defense."

Dohany v. *Rogers,* 281 U.S. 362, 74 L. Ed. 904, 50 S. Ct. 299

Headnote 11.

"The requirement of the due process clause are satisfied if one has reasonable notice and reasonable opportunity to be heard and present his claim or defense, due regard being had to the nature of the pro-

ceeding and the character of the rights which may be affected by it."

City of Chicago v. *Cohen,* (1927) 326 Ill. 372, 158 N.E. 118, 55 A.L.R. 196
Headnote 5.

"The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."

STATEMENT OF THE CASE

The evidence is undisputed that Sam Levin and Claude Davidson entered into a written contract, each in an individual capacity, for the delivery of fill-dirt to a site in Hamilton County, Ohio. A theatre was to be erected on the site by Sheridan Theatre Inc. Sam Levin was president of this corporation and Louis Levin was treasurer. The written agreement provided that payment for the fill-dirt was to be made on the basis of $.53 per cubic yard of fill-dirt delivered, and compacted in place. The agreement further provided that the measurement of the number of cubic yards delivered was to be determined by an engineering firm employing a method of topographic surveys.

This was done, and payment was made upon this basis for the entire amount shown due by the engineering firm, of 173,000 cubic yards. Levin Service Co. which performed accounting services for Sheridan Theatre Inc., as well as other companies, issued checks to respondent on its account, on behalf of Sheridan Theatre, Inc.

The controversy arose when respondent claimed that the final survey of the engineering firm was inaccurate, and had its own engineer make a survey. (It declined to make

this survey or the computations derived therefrom available at the trial.)

Respondent filed suit against petitioners, Sam Levin, Louis Levin, and Levin Service Co., each of whom filed separate denials of liability. It claimed that the written agreement for measurement by engineering survey was no longer applicable; that it had been changed by oral agreement to simply counting the number of trucks arriving at the site as determined by its employees. It claimed that it delivered 34,000 more cubic yards of fill-dirt than had been shown by the engineering survey to have been delivered.

Although the oral change from surveys to counting truck deliveries was vigorously denied, and respondent admitted that the engineering survey was more accurate than its method of counting truck deliveries, the jury nevertheless returned a verdict for $26,734.21 against the three petitioners named as defendants in the suit, namely, Sam Levin, Louis Levin and Levin Service Co. The verdict was a joint verdict, and not several. This verdict was appealed to the Court of Appeals for the Second District of Ohio. Among the errors assigned, was No. 3, "Joint Liability has not been established." Appendix, Page 18.

The only evidence adduced with reference to Levin Service Co. is that it performed accounting services (R 714-716, Appendix, pages 37-39), and handled payment of bills for various companies. Respondents testified that their only knowledge of any nexus between Levin Service Co. and the delivery of the fill-dirt, was their receipt of checks from this firm, in payment of most of the billings. (R. 320-321, Appendix, pages 37-38) There is no evidence that Sam Levin, Louis Levin, or Levin Service Co. invested a penny of their monies in this project, or had any ownership in the theatre, or shared in the profits or losses.

Under these circumstances, the appellate court was unable to sustain the verdict of joint liability against Levin Service Co. as a principal. It thereupon adopted the theory of "Joint Enterprise" to hold Levin Service Co. liable jointly with Sam Levin and Louis Levin, in the following language,

> "Under the circumstances shown here, we conclude that the trial court correctly determined that Levin Service Co., Louis Levin, and Sam Levin were engaged in a joint enterprise as that term is described in 31 Ohio Jurisprudence 2d, 317-331, Joint Adventures, Sections 1-15."

This is found in Appendix, page 25.

The language contained in the above paragraph, that, "the trial court correctly determined that Levin Service Co., Louis Levin and Sam Levin were engaged in a joint enterprise." is unfortunately without foundation. The verdict was by a jury, not by the trial court. The only opinion rendered by the trial court occurred in overruling petitioners' motion for a new trial, and for judgment notwithstanding the verdict. No such language or theory appeared therein, nor was this theory of liability pleaded. The jury was not instructed in any manner on this issue, nor was it requested to do so by either side. See Appendix, pages 17-19, for this opinion.

This theory of liability appeared nowhere in the briefs of either side, filed with the Court of Appeals. It adopted this theory entirely of its own volition without requesting briefs by either side on this theory.

RAISING OF FEDERAL QUESTION

The federal question was first raised in the appeal to the Supreme Court of Ohio, in petitioner's brief under "Proposition of Law No. 3".

"It is error to sustain a verdict of joint liability on the sole ground that the evidence shows that the parties were engaged in a 'joint enterprise' when the jury has not been charged on this issue."

The brief argument in support of this assignment of error follows:

"On the basis of its review of the evidence, the appellate court found that joint liability had been established under the doctrine of 'joint enterprise', which the appellate court defined as being described in 31 Ohio Jurisprudence 2d, 317-331, Sections 1 to 15, being the entire chapter of Joint Adventure. This basis of liability was neither alleged nor considered in the trial court. It was neither raised nor argued in the briefs of either party in the Court of Appeals, nor did the appellate court request briefs on this issue. The jury was neither charged nor instructed on this issue.

"We submit that when the only basis upon which an appellate court can sustain a verdict is one upon which the jury received no instruction whatsoever, then the party found against has been deprived of a jury trial upon the very issue upon which his liability has been determined to rest."

Among the authorities cited in support of this proposition of law was the following: "United States Constitution, Fourteenth Amendment, Section 1." This section was fully exemplified in said brief in support of this proposition of law.

The Supreme Court of Ohio rendered no opinion. It denied petitioners' appeal on the ground that "no debatable constitutional question is involved." Said order is attached, Appendix, pages 34-35. The first opportunity that petitioners could raise this constitutional question occurred in the Supreme Court of Ohio, since the theory of

"joint enterprise", sustaining the verdict of the jury of joint liability, was adopted for the first time by the Court of Appeals, after the briefs of both sides had been submitted, neither of which referred to such a theory of liability, which was neither pleaded nor tried in the trial court.

SUBSTANTIALITY OF THE FEDERAL QUESTION

We respectfully submit that it cannot be denied that petitioners have been deprived of their right to due process of law under the Fourteenth Amendment to the Federal Constitution, when joint liability was found to rest solely on a theory of "joint enterprise" by the appellate court, upon which doctrine the jury was not charged, nor was such ground of liability pleaded. Also petitioners submit that they were deprived of their right to be apprised under the pleadings of such theory of liability, so that they would be able to prepare their defense.

It is fundamental that the theory of liability may not be changed in the appellate court.

The State of Ohio has seen fit to ignore the pleas of petitioners that their rights under the Fourteenth Amendment to a fair trial by jury have been invaded when the jury was not charged or otherwise instructed on a doctrine of liability, which was neither pleaded, nor defined, upon which their liability was found to rest.

This is a relatively small case, involving only $26,734.21, but the principle involved is great. Unless this court sees fit to consider and upon appropriate finding, remand this case to the Supreme Court of Ohio for review of the constitutional issues, then the protection afforded to small litigants by the Fourteenth Amendment to the Federal Constitution is substantially of no avail in the State Courts, and the State of Ohio as well as other states, may treat with

impunity small litigants, whose rights under the Federal Constitution have been invaded.

The State Courts, realizing the great burden of litigation under which this court rests, are aware that few small litigants will appeal to the Supreme Court, and under the load of their own dockets, restrict their hearings to matters of great general interest, or to matters which have not theretofore been decided by the court.

Thus, to effectively protect the rights to due process of law of thousands of litigants from invasion by the State Courts, (whose means and the amount in issue generally preclude their appeal), we submit that it is essential, from time to time, that the State Courts be reminded of their obligation to protect the rights of small litigants under the guarantees of the Fourteenth Amendment to a fair trial.

It is essential, we submit, that this case act as a clear cut precedent to every state court, that small litigants may not be deprived of their right to be apprised by the pleadings of the issues they are to face; that the jury is to be instructed on every issue upon which the liability of the party is to depend; and that the theory of liability may not be changed in the appellate court from that tried in the trial court.

CONCLUSION

We therefore respectfully submit that the Petition for a Writ of Certiorari be granted in this case.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

In The
COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CASE NO. 129990

DAVIDSON EXCAVATING. INC.,
Plaintiff,

vs.

LEVIN SERVICE CO., SAM LEVIN, and LOUIS LEVIN,
Defendants.

On Motion to Set Aside Judgment in Favor of Plaintiff Upon Verdict of Jury and for Judgment for Defendants Notwithstanding the Verdict.

DECISION AND ENTRY

The Defendants filed Motion for this Court to set aside the Judgment in favor of the Plaintiff entered upon the Verdict of the Jury and to enter judgment for the Defendants notwithstanding the Verdict, and the Motion was argued by Counsel in open Court, and Counsel also filed briefs upon the same.

The Defendants in Motion for New Trial allege five grounds: (1) Said judgment is not sustained by sufficient

evidence; (2) Said judgment is contrary to law; (3) Errors of law occurring at the trial, excepted to by Defendants; (4) Excessive damages, appearing to have been given under the influence of passion and/or prejudice; and (5) For other errors in the face of the record.

The Defendants in "Memorandum in Support of Motion for Judgment N.O.V. and Motion for New Trial" argue on seven grounds, that are: (I) No cause of action whatsoever has been established against Levin Service Co.; (II) The Theories of Liability against Louis Levin and Sam Levin are Mutually Exclusive of Each Other so as to Preclude Joint Recovery against Both for the same Liability; (III) Joint Liability has not been established; (IV) As a Matter of Law, the Court Should Have Directed a Verdict for the Defendants on the Question of Extras; (V) The Court Committed Prejudicial Error by Refusing to Submit Defendants' Special Instructions to the Jury; (VI) The Court Committed Prejudicial Error by Refusing to Submit Defendants' Special Interrogatories to the Jury; and (VII) The Inconsistencies in Plaintiff's own Evidence are so Patent and so Blatant as to Deprive said Evidence of Any Substantial Probative Value.

Going into the "Memorandum", the Court finds as to (I) the Jury was correct in its Verdict, as there was ample evidence to make a cause of action against Levin Service Company — this ground is not well taken; as to (II), The Jury was correct in its Verdict, as there was ample evidence to show and uphold a Joint recovery against Louis Levin and Sam Levin, for the same liability; as to (III) the Jury was correct in its Verdict, as Joint Liability was established by the evidence. As to (IV), the question of Extras was a Jury Question, and the Jury passed upon that Question, and the Court should not have directed a Verdict for the Defendants upon that Question. As to

Decision and Entry

(V) The Court carefully considered the Special Instructions tendered by each side in the controversy, and charged the Jury those Special Instructions that were proper, regardless of who tendered the same. As to (VI), the Court carefully examined the tendered Special Interrogatories, and not many were found to be proper under the present laws of Ohio, those the Court gave, and the Record shows the reasons why the Court refused to submit the Interrogatories that the Court found not to be proper herein; as to. (VII), the evidence was submitted to the Jury, and the Jury found for the Plaintiff upon the evidence submitted to it; it apparently believed the Plaintiff's evidence.

The Court finds upon the five statutory grounds as first shown, that they are not well taken, and must be overruled.

The Court finds that the seven grounds in the "Memorandum" are not well taken and must be overruled.

Now, therefore, the Court overrules Defendants' Motion for the Court to set aside the Judgment in favor of Plaintiff entered upon Verdict of Jury, and overrules the Motion for the Court to enter Judgment for the Defendants notwithstanding the Verdict, and also overrules the Motion of the Defendants for a New Trial herein.

To all of which the Defendants, by counsel, except.

/s/ C. LUTHER SWAIM
Judge, by assignment.

In The
COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

Case No. 3556

DAVIDSON EXCAVATING, INC.,
Plaintiff-Appellee,

vs.

LEVIN SERVICE CO., SAM LEVIN and LOUIS LEVIN,
Defendants-Appellants.

OPINION

Rendered on the 25th day of August, 1970

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Opinion

SHERER, J.

This appeal is on questions of law from a judgment rendered by the Common Pleas Court of Montgomery County on a jury verdict in the sum of $35,088.65, plus interest and costs. In this action Davidson Excavating, Inc. seeks to recover for labor and materials, including fill dirt, claimed to have been furnished to Appellants in constructing a site for a drive-in theater near Cincinnati.

Plaintiff's first cause of action is based upon a claim for $11,315.00 for extra work performed during the performance of a written contract executed on January 21, 1966. The second cause of action is based upon a claim for the same work in the same amount on the theory of quantum meruit: The third cause of action was on an account for work and material provided subsequent to the performance of the written contract in the sum of $38,940.60. The fourth cause of action is for the same work and material and in the same amount referred to in the third cause of action based upon the theory of quantum meruit.

The jury's verdict found that there is due Plaintiff-Appellee, Davidson Excavating, Inc., from the Defendants-Appellants, Levin Service Co., Sam Levin and Louis Levin, the sum of $35,088.65. The Trial Court rendered judgment in favor of Davidson Excavating, Inc., against Levin Service Co., Sam Levin and Louis Levin, in that amount plus interest and costs.

In answer to Special Interrogatory No. 2, the jury stated that Plaintiff was entitled to recover for extra items over and above its claim for dirt delivered, the sum of $7,675.00 plus interest thereon of $679.44 for the following items:

Item 3 — $1125.00
Cost of hiring the man to count the loads of dirt placed by Davidson on the premises.

Item 5 — $400.00
Cost of regrading and changing locations of grade stakes on the premises.

Item 6 — $150.00
Cost of impacting a two foot higher grade for fill of the latter area.

Item 7 — $150.00
Cost of engineer for new location of No. 1 ramp 25 feet closer to the screen.

Item 8 — $4250.00
For 1,000 loads of water at $4.25 per load.

Item 9 — $200.00
For calcium chloride and reasonable labor.

Item 11 — $1,400.00
Extra work performed on final grade elevation at request.

The first error assigned is that no cause of action has been established against the Levin Service Co.

The first cause of action alleges that Plaintiff-Appellee, Davidson Excavating, Inc., and Defendants, Levin Service Co., and Sam Levin entered into a written contract on January 21, 1966, whereby Davidson agreed to deliver 100,000 cubic yards of gravel or fill dirt and to perform certain excavating and related work to real property belonging to all the Defendants.

The evidence shows that Appellants, Sam Levin, Louis Levin, and Allen Levin took possession of the property in question under the terms of a lease from the owner thereof, Sharon Development Corporation, with an option to purchase; that they assigned the lease to Sheridan Theaters, Inc.; that the theater corporation operated the theater under a separate corporation, J. Roger, Inc. The stock in J. Roger, Inc. was owned by Sheridan Theaters.

All of the Levins mentioned were officers of J. Roger, Inc., Sheridan Theaters, Inc., and Levin Service Co.

The contract in evidence shows that it was executed by Sam Levin and Claude Davidson as individuals. It provided for payment of 53 cents per cubic yard after each 20,000 have been delivered, with a holdback of 20 percent and that the amount delivered was to be determined by a topographical survey. The evidence shows that the price was increased upward 5 cents by later agreement and the holdback was decreased to 15 percent.

The evidence shows that Davidson Excavating, Inc. billed Sam Levin for the first 20,000 cubic yards delivered and that payment was made by check of Levin Service Co. Thereafter, Davidson Excavating, Inc. billed Levin Service Co. and thereafter received all payments excepting one from Levin Service Co. At Record 706, Louis Levin testified that Davidson sent a bill August 2, 1966, Exhibit 23, and that he sent a note to Davidson, as follows: "Red, will try to have Louis Graf Co. do a cross-section this week and pay the balance at that time." Defendant's Exhibit I was a report from Graf to Levin Service Co. advising that prior to August 15, 1966, 151,586 cubic yards of fill were in place. On August 22, 1966, Graf sent a supplementary report to Levin Service Co. advising that as of August 15, 1966 there were 170,220 cubic yards of fill in place.

After the 100,000 cubic yards had been delivered and paid for by check of Levin Service Co., Sam and Louis Levin requested that additional fill dirt be delivered to the site and similarly graded and compacted as for the first 100,000 cubic yards.

The second assignment of error is that:

"The theories of liability against Louis Levin and Sam

Levin are mutually exclusive of each other so as to preclude joint recovery against both for the same liability."

The third assignment of error is that "Joint liability has not been established."

Appellants argue, pages 12 and 13 of their brief, that there is not one whit of evidence that Louis Levin ever acted other than as an agent of Sam Levin. They cite an instance where both were at the site and after a disagreement between them as to a drainage problem, Sam said, "I am calling the shots here. Let the man do the calculating and put the dirt out there." There is also testimony that on one occasion Sam told Louis to "shut up". However, there is other evidence which is inconsistent with Appellants' argument. Louis Levin testified that he prepared the written agreement and Sam signed it after which Louis took it to Claude Davidson at Cincinnati for signature. Louis testified, R. 686, that Sam did not accompany him to Davidson's office and that the following words were added by him at the bottom of the contract in Davidson's office:

"Approximately 100,000 cubic yards of fill are to be delivered. Payment in full to be made upon completion of the fill. Rate for D-6 dozer to be $14.00 per hour if needed for stripping corn, or any additional work."

At R. 688, Louis testified that he examined the fill dirt Davidson proposed to use and approved it. He testified, R. 691,692, that Davidson asked that the price per cubic yard be increased and that he discussed it with Sam and that "we agreed" to give him 5 cents more per cubic yard. At R. 728, Louis testified that regarding anything that was of any important nature it was normal procedure for him to confer with Sam before "we would decide to do something. There is a considerable use of the words "I"

and "we" in the testimony of Louis regarding what was done by them in connection with the project.

Appellants' argument is inconsistent with the foregoing evidence and with the fact that Sam, Louis and Allen Levin were the holders of the lease on the land with an option to purchase. Under the circumstances shown here, we conclude that the Trial Court correctly determined that Levin Service Co., Louis Levin, and Sam Levin were engaged in a joint enterprise as that term is described in *31 Ohio Jurisprudence (2d), 317-331, Joint Adventures, Sections 1 to 15.*

We see no merit in the first, second and third assignments of error.

The fourth assignment of error is that the Court should have directed a verdict for the Defendants on the questions of extras.

We have noted that in answer to Interrogatory No. 1 the jury found that there was due Davidson Excavating, Inc. from the Appellants for extras Items 3, 5, 6, 7, 8, 9 and 11 claimed by Davidson in the sum of $7,675.00, plus interest thereon of $679.44, or in the total sum of $8,354.44. We must presume that this amount was included in the jury's verdict and in the Court's judgment.

One Davidson and one Barton were the apparent owners and operators of Davidson Excavating, Inc. Barton testified that a dispute arose as to the total amount of dirt delivered to the site, Davidson claiming to have delivered over 202,000 cubic yards of dirt and Appellants claiming that only 172,000+ cubic yards were delivered. He testified that when this dispute arose they billed Appellants for the extras although at the time the extras were furnished they did not intend to make any charge. The evidence does show that all of the extra items allowed by the jury

were requested by either Sam or Louis Levin and there is a presumption under the circumstances that the one requesting such services expects to pay the reasonable value thereof. However, this presumption has been overcome by the testimony of Barton and we find no other testimony in the record to the contrary.

The fifth error assigned is that the Court committed prejudicial error by refusing to submit Defendants' requested Special Instructions "A", "B" and "C" to the jury.

Requested Special Instruction "A" related to the question of "extras" and Appellants requested an instruction to the effect that the Plaintiff was required to prove that there was an agreement as to what was to be paid for such items. We see no error in the Court's refusal to give such instruction.

In so far as extras are concerned, Plaintiff sought recovery both on the theory of contract and on the theory of quantum meruit. In the latter case, the law implies that one who requests the performance of work and the furnishing of material is to pay the reasonable value thereof unless it is shown that no payment was expected by the one furnishing the work, labor and material.

Requested Special Instruction "B" is to the effect that in order for Plaintiff to recover in an action on an account it was required to prove that it maintained a statement in detail of the transaction between the parties made contemporaneously with the transactions themselves. The law requires entries in account books to be made "at or near the time of the act, condition or event." *Section 2317.40, Revised Code.* "Contemporaneous" may mean "at the same time" or "at or near the time". The Trial Court properly refused this requested instruction because it was ambiguous and misleading.

Furthermore, this requested special instruction is directed to Plaintiff's claim in its third cause of action which is on account for work, labor and material furnished subsequent to the performance of the written contract for the delivery of 100,000+ cubic yards of dirt. The Plaintiff's fourth cause of action seeks recovery for the same items on the theory of quantum meruit.

The jury rendered a general verdict. There were two issues before the jury on these items, *one,* whether Plaintiff established a right of recovery on the theory of account, and *two,* whether Plaintiff established a right of recovery on the theory of quantum meruit. In its general instructions the Trial Court properly charged the jury on the issue of quantum meruit as related to the items for which recovery is sought on that issue. Appellants dispute this latter statement, claiming that there is no evidence of the reasonable value of the items for which recovery is sought on the theory of quantum meruit. We find testimony to the effect that amounts charged for such items "are fair". This is sufficient.

In order to secure a reversal of the judgment here for the failure to give requested Special Instruction "B" relating to actions on an account, the record must show that Appellants were prejudiced thereby. *Section 2309.59, Revised Code. Smith* v. *Flesher, 12 Ohio St. (2d), 107, 233 N. E. (2d), 137.* The general verdict here for the Plaintiff-Appellee is as consistent with the determination by the jury that Appellants were liable to the Plaintiff in the amount of the judgment on the theory of an account as that Appellants were so liable on the theory of quantum meruit. There has been no showing of error in the submission of the issue of quantum meruit to the jury and it does not affirmatively appear that Appellants were prejudiced by the Court's refusal to give this requested Special Instruction

"B" to the jury. Had the Court not refused to give such requested Special Instruction, the jury would probably have rendered the same verdict.

Requested Special Instruction "C" related to the need for evidence of the reasonable value of the work performed in connection with *each* of the extras claimed by the Plaintiff.

Section 2315.16, Revised Code, authorizes the Trial Court to instruct the jury, if they render a general verdict, to specially find upon particular material allegations in the pleadings controverted by an adverse party, and submitted to the jury by the Court in writing. There is no allegation in Plaintiff's petition as to the value of *each* item of extras claimed. We see no merit in this assignment of error.

Assignment of Error No. 6 is that the Court committed prejudicial error by refusing to submit Defendants' special interrogatories to the jury.

The first special interrogatory refused by the Court is:

"How many cubic yards of compacted fill do you find were on the Jolly Roger Drive-In Theater site when Davidson, Inc. completed its construction work?"

This interrogatory calls for an answer as to an evidentiary fact, not for an answer to a material allegation contained in the pleadings and controverted by the Defendants-Appellants. This requested interrogatory was properly refused.

The second interrogatory requested by Appellants and refused by the Court is:

"Do you find by a preponderance of the evidence that the parties continued to follow the terms of the written contract of January 21, 1966, after the delivery of the first 100,000 cubic yards of fill dirt, with the exception of the

price change from 63 to 68 cents per cubic yard and the holdback?"

This interrogatory does not call for findings on "particular material allegations" contained in Plaintiff's petition controverted by Appellants and was properly refused.

The seventh assignment of error is that the verdict and judgment were not supported by sufficient evidence. We have thoroughly examined the record and find sufficient evidence to support the verdict and judgment excepting that portion thereof for extras in the sum of $8,354.44, which amount the jury included in its verdict as shown by its answers to Special Interrogatory No. 2 heretofore set forth.

If Plaintiff-Appellee consents, this Court will modify the judgment rendered in the amount of $35,088.65 by reducing it by the sum of $8,354.44 and, as modified, will affirm the judgment. If Plaintiff-Appellee refuses to consent to such modification, the judgment will be reversed.

KERNS, P. J., and CRAWFORD, J., concur.

Decision on Motion

In The
COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

Case No. 3556

DAVIDISON EXCAVATING, INC.,
Plaintiff-Appellee,

vs.

LEVIN SERVICE CO., SAM LEVIN
and LOUIS LEVIN,
Defendants-Appellants.

DECISION ON MOTION

Rendered on the 24th day of September, 1970

YOUNG & ALEXANDER, By Robert C. Alexander and Irvin H. Harlamert, Jr., Of Counsel, Suite 100, Price Brothers Building, 367 West Second Street, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellee

KUSWORM & MYERS, By Jacob A. Myers, 820 Gem City Savings Building, Dayton, Ohio 45402
and

IRVING I. SAUL, 1001-4 Harries Building, 137 North Main Street, Dayton, Ohio 45402
Attorneys for Defendants-Appellants

Decision on Motion

BY THE COURT:

This matter is before the Court on motion of Appellant for a reconsideration of this Court's opinion rendered on the 25th day of August, 1970.

The questions raised by the motion were previously raised and considered by this Court and we see no reason to change the conclusions reached in our previous opinion.

The motion for reconsideration will be overruled.

KERNS, P. J., SHERER and CRAWFORD, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO
1971 TERM

To wit: March 3, 1971

No. 70-715

THE STATE OF OHIO,)
)
City of Columbus.)

Davidson Excavating, Inc.,

Appellee,

vs.

Levin Service Co., et al.,

Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MONTGOMERY COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by Irving I. Saul

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... : Clerk
..... Deputy

Mandate

THE SUPREME COURT OF THE STATE OF OHIO
1971 TERM

To wit: March 3, 1971

No. 70-715

THE STATE OF OHIO,)
)
City of Columbus.)

Davidson Excavating, Inc.,

Appellee,

vs.

Levin Service Co., et al.,

Appellants.

MANDATE

To the Honorable COMMON PLEAS COURT Within and for the County of MONTGOMERY, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

..... 19....

.....

..... Deputy

RECORD OF COSTS

Docket Fee $20.00 Paid by Irving I. Saul

Appeal from Court of Appeals

THE SUPREME COURT OF THE STATE OF OHIO

1971 TERM

To wit: March 3, 1971

No. 70-715

THE STATE OF OHIO,)
)
City of Columbus.)

Davidson Excavating, Inc.,

Appellee,

vs.

Levin Service Co., et al.,

Appellants.

APPEAL FROM THE COURT OF APPEALS FOR MONTGOMERY COUNTY

This cause, here on appeal as of right from the Court of Appeals for MONTGOMERY County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified

to the Clerk of the Court of Appeals for MONTGOMERY County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk

..... Deputy

Rehearing

THE SUPREME COURT OF THE STATE OF OHIO
1971 TERM

To wit: March 31, 1971

No. 70-715

THE STATE OF OHIO,)
)
City of Columbus.)

Davidson Excavating, Inc.,
Appellee,

vs.

Levin Service Co., et al.,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 31st day of March, 1971.

THOMAS L. STARTZMAN, Clerk.
By ..... Deputy.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Nancy Barton — Direct Examination

[R. 320] MR. HARLAMERT: (Continuing his direct examination:)

(To reporter) Please mark this as Plaintiff's Exhibit No. 24 for identification.

(So marked Pltf. Exhibit No. 24—Idt.)

Q Mrs. Barton, I will hand you what is marked Plaintiff's Exhibit No. 24 for identification. Tell the court and jury what that is?

A This is a page from my Accounts Receivable Ledger —and the name on the top is "Levin (Bros.) — originally I had "Bros." and after the first check came in I corrected it to read "Levin Service Co. Inc."

Q Are all the markings in your handwriting?

A Yes, everything on this page is in my writing.

Q You say, at the top it is marked "Levin Bros."?

A Levin (Bros.) Service Co., Inc., yes.

Q Explain when and why you made these remarks?

[321] A. The date of entry — 1st invoice — March 15th. It was my understanding it was Levin Brothers. I just had the contract signed by Sam, and knew that we were dealing with Lou Levin too so I entered it on this page that way. When the first check was returned to me, I put the parentheses around "Bros." and put Service Co. Inc.

Q What additional words did you put on your account?

A Service Company, Inc.

Louis Levin — Cross Examination

[R. 714] Q Do you know specifically on January 21, 1966, whether Mr. Sam Levin was owner of the land on which you were putting this theater?

A Sam Levin was not then the owner, nor is he now.

Q Some sort of a lease to Mr. Sam Levin, to you and your brother.

A Yes.

Q At that time what connection, if any, did the Levin Service Company have with this contract?

A The Levin Service Company is merely a company that handles the accounting work * * * payment of bills and this sort of thing.

Q Are you an officer of that company?

A I believe I am, yes.

Q Aren't you sure?

A Well, we have a good many projects. Some I am directly involved in and some not. I believe I am an officer of that company.

Q And you are an officer of Sheridan Theatre, Inc.?

A Yes.

Q In looking at these check vouchers from Plaintiff's Exhibit 25, isn't it true that all of these but one were issued by Levin Service Company?

[R. 715] A Yes.

Q And the only one, Sheridan Theatre, Inc. of Chicago.

A That is right.

Q Are you an officer of that corporation?

A Yes, I am.

Q Do you know why this paper was made * * * Sheridan Theatre, Inc.?

A Yes, actually the Sheridan has an interest in the ownership of the theater.

Q What interest does it have?

MR. BRIDGE: If the Court please, I object. I don't see that the Sheridan Theatre is a party in this suit and I don't think it's relevant in this case.

THE COURT: This is cross-examination, Mr. Bridge. I will allow the question * * * objection overruled.

A I believe the Sheridan is the owner of the theater.

Q Sheridan is the owner of which theater?

A Jolly Roger.

Q So, what was the connection, what was the relationship between the Sheridan Theatre, Inc., and Levin Service Company, Inc.?

A Well, Levin Service Company as I said, handles the accounting * * * the payment of bills for the Sheridan as it does for other corporations and this check written by the Sheridan really should have been written by Levin Service Company; although it was proper for the Sheridan to do it * * * since the Levin Service Company [R. 716] was handling the bill, it should have been the Levin Service Company too.

Q Are you an officer of all of these corporations?

A Yes.

Q Is Sam Levin an officer of each of these corporations?

A Yes.

Q Now, Mr. Levin, referring again to that original contract * * * isn't it true in the first paragraph of the contract that it refers to Sam Levin * * * here, refers to Sam Levin as owner?

A Yes.

Q He was not in fact, an owner of this land was he?

A Not as far as title is concerned, no, although he does have an option to purchase that land.

Q Well, but it was legally leased to him and to you and another brother?

A Yes.

CHARGE OF THE COURT

[R. 1047] Members of the Jury, you have heard the evidence and the arguments of counsel, and the Court now instructs you on the law that applies to this case.

The Court and the Jury have separate functions; you decide the disputed facts and the Court provides the instructions of law, which it is your sworn duty to accept and apply. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

As you remember, the Court gave you certain instructions before the final arguments. They are in writing, and will be with you in the jury room. The written instructions cover only certain phases of this case. They have no more weight than the general instructions which include all phases of the case. Instructions before argument and the following general instructions together constitute the law of the case.

The person or persons who claim that certain facts exist must prove them by a preponderance of the evidence; this obligation is known as the burden of proof. The burden of proof is upon plaintiff to prove the facts necessary for its case by a preponderance of the evidence. Later, the Court will outline and explain the factual issues which you must decide.

Preponderance of the evidence simply means the greater weight of the evidence. The greater weight of the evidence is evidence that outweighs or overbalances, in your minds, the evidence opposed to it; evidence that is more probable, [R. 1048] more persuasive and of greater probative value.

Evidence is the testimony received from the witnesses the exhibits admitted during the trial, facts agreed to by

counsel and facts that the Court requires you to accept as true, and may be direct or circumstantial, or both.

Direct evidence is the testimony given by a witness who has seen or heard the fact to which he or she testified, and includes the admitted exhibits. Circumstantial evidence is proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally or logically follow, according to mankind's common experience. To make an inference is to reach a reasonable deduction of fact that you may but are not required to make from other facts that you find have been established by direct evidence.

The evidence does not include any pleadings or statements of counsel, unless they were admissions or agreements admitting certain facts. Opening statements and closing arguments of counsel are not evidence. Answers that were stricken by the Court and that you were instructed to disregard are not evidence and must be treated as though you never heard them.

To determine the preponderance of the evidence, you must consider the credibility of the witnesses. You will apply the tests of truthfulness that you are accustomed to apply in your daily lives, considering the appearance upon the stand, the [R. 1049] manner of testifying, the reasonableness of the testimony, the opportunity to see, hear and know the things concerning which he or she testified; accuracy of memory, frankness or lack of it, intelligence, interest or bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to each witness, such weight as you deem proper. You are not required to believe the testimony of any witness simply because he or she was under oath; you may believe or disbelieve all or any part of the testimony of any witness and to determine what testimony

is worthy of belief and what testimony is not worthy of belief.

In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

Generally a witness may not express an opinion, but one who follows a profession may express an opinion, because of his education, knowledge and experience, and it is admitted for whatever assistance it may provide to help you arrive at a just verdict. As with other witnesses, upon you alone rests the duty of deciding what weight shall be given to the testimony.

Questions have been asked in which an expert witness was permitted to assume that certain facts were true, and if any assumed fact was not established by a preponderance of the evidence, you will determine the effect of that failure upon the value of the opinion. Again as with other witnesses, upon you [R. 1050] alone rests the duty of deciding what weight shall be given the testimony of such experts, using the usual rules for testing credibility and determining the weight to be given to such testimony.

What is a contract? A contract, whether written or oral, is an agreement between two or more parties, competent to contract, upon a lawful subject-matter, with a legal consideration, a mutuality of obligation.

It is not necessary that a contract should be in any precise form of words, but it is sufficient if the contracting parties understood and assented to its essential terms and conditions; and that assent may be inferred from the acts, conduct and declarations of the parties.

It is a rule of law that where persons enter into an agreement in writing that all oral stipulations or representations

prior to the time of its execution are presumed to be embodied in the written contract.

However, when a contract is prepared by one of the parties to it, or by someone for one of the parties only, and that such one of the parties is responsible for the language used in the contract, and that such language is susceptible to more than one construction, then such language should be construed most strongly against the party who used it and who is responsible for it.

If you find by a preponderance of the evidence that these [R. 1051] parties made any changes in the written contract verbally, directly or by telephone communication, then it is your duty to say what changes, if any, were made, and then apply the various rules of law to the changed contract.

The plaintiff may recover for extra work if it shows as to the claims that it makes for extra work, that as to each one, that it was done under a contract independent of the original contract. The Court further charges you, that if the contract or contracts did not cover and were not intended to cover certain things, that in the fulfillment of the terms of the contract, were necessarily performed, and that such work was performed by one party, and the benefits were accepted by the other party, knowing that the same were not gratuitously given, then as to such items that you may find were outside o fthe contract or contracts, then you may find the party performing such work or services, or furnishing such materials is entitled to reasonable compensation for such services or things.

In other words, where one is benefited by work done for him or material furnished to him, with the expectation of receiving payment therefor, an implied obligation on his part to pay what such work or material is reasonably worth arises. But a promise to pay for work or goods will not

be inferred generally unless there is evidence that the party receiving the benefits of such work or materials requested the work or material or goods, or assented to receiving their benefit, under circumstances that [R. 1052] negate any inference that they would be gratuitous or free.

Also, in other words, it is necessary that the services be rendered, work performed or materials furnished by one party for another be under such circumstances that the party to be charged, either knew or understood, or should have known or understood, that the services and work and materials were given with the expectation of being paid for on the basis of their reasonable worth.

If there was no explicit agreement as to price, then the fair and reasonable value of such services, or work, or materials, at the time and place would control.

The Court charges you that a contract is assignable unless there is something in the terms or nature of the contract that indicates an intention of the parties to the contract that such a contract is not assignable, or unless such an assignment is prohibited by law (as are many public contracts), or unless there is something in the policy of law that prohibits an assignment of the particular contract or type of contract.

The Court further charges you that an assignment of a contract of the type herein, whether written or verbal or implied, is not prohibited by law, nor is the contract or contracts of such nature that the policy of law prohibits an assignment.

The Court further charges you that an assignment may be established by parol evidence, by such evidence that establishes by a preponderance of the evidence that there has been such an [R. 1053] assignment, and the knowledge of the other party as to such an assignment, with the consent of such other party to the assignment, may be estab-

lished by parol evidence or words or acts of the other party, by a prepondorance of the evidence.

The law of Ohio provides that actions in law, such as this one is, shall be brought by the "real party in interest."

In this action, Davidson Excavating, Inc., which is used for short for Incorporated, says that Levin Service Company, Sam Levin and Louis Levin owe money for services rendered for fill delivered to the defendant by the plaintiff to land belonging to the defendant on the south side of Kemper Road and east of the Miami-Erie Canal and which property is now known as the Jolly Roger Drive-In Theater.

The parties do not agree as to the amount of fill dirt delivered by plaintiff to the theater. The plaintiff claiming 207,770 cubic yards of dirt were furnished while the defendant claims only 172,368 were actually delivered.

Plaintiff also claims for many extras in connection with the work of improving, grading and compacting the fill in addition to that claimed as still due for the fill dirt furnished.

Defendant claims they owe nothing to the plaintiff.

Plaintiff claims there were two different agreements as to fill dirt. A written contract of January 21, 1966 relating to 100,000 cubic yards of dirt and a second agreement, a verbal [R. 1054] agreement or contract, relating to fill dirt after the first 100,000 yards under which they delivered 107,770 cubic yards of fill dirt.

Defendant claims there was only one contract * * * the written contract of January 21, 1966 and the same ran to the end of the work with a verbal second change in price per cubic yard for the first 100,000 cubic yards.

Plaintiff, Davidson Excavating, Inc., claims that money is due from the defendants, Levin Service Company, Sam

Levin and Louis Levin under two alleged different agreements.

It claims first, with reference to the first one hundred thousand cubic yards of fill dirt, mentioned in the written contract of January 21, 1966, between Sam Levin and Claude Davidson, on property of the latter "located on the south side of Kemper Road, east of the Miami-Erie Canal." The original price for this fill dirt, delivered, graded, and compacted, was a total of fifty-eight cents per cubic yard, which was soon changed by verbal agreement to sixty-three cents per cubic yard. Plaintiff admits that the entire total amount of 100,000 cubic yards of fill dirt was all paid for at this rate of sixty-three cents per cubic yard, but plaintiff claims that there were extras for work and labor, not covered by the contract nor included in its terms, performed at request of defendants for which it is entitled to compensation from the defendants for:

Recutting and regrading for three changes of site for [R. 1055] theater, moving dirt on site with D-9, 20,000 cubic yards at 36¢ per cubic yard	$ 7,200.00
Additional expense for truck hauling due to change in theater site to location 500 feet further, at the rate of 10¢ per ton, per mile, for the 100,000 cubic yards	$ 4,015.00
Removal of guard rail on Kemper Road	$ 100.00
Total claimed for these extras, still unpaid	$11,315.00

As I stated defendants deny they owe anything.

Plaintiff further claims under a verbal contract for an additional fill, to same location, at sixty-eight cents per cubic yard, and for extra dirt over

the second 100,000 cubic yards, claiming that the defendants have failed to pay it on billings for this 100,000 yards the sum of Nineteen thousand five hundred and thirty dollars $19,530.00

and there is due for 7.770 extra yards, the sum of 5,283.60

Total claimed for unpaid amount of fill furnished under this second contract of $24,813.60

The plaintiff also claims extras outside of the dirt and work to be done on the fill, the price of sixty-eight cents, as follows:

Additional expense for truck hauling mileage due to change in theater site to location 500 feet further at rate of 10¢ per ton per mile, for 100,000 yards	$ 4,015.00
[R. 1056] Cost of hiring man specifically for the job of load counter at drive-in site, as requested	2,250.00
Undercutting and maintaining access roads	1,200.00
Regrade and change locations of grade stakes placed, in error, by Graf	400.00
Computed two foot higher grade for theater area only	150.00
New location of No. 1 ramp, 25 foot closer to screen by field engineer	150.00
1000 loads of water, at $4.25 per load	4,250.00
Calcium chloride for access road	300.00
Extra work performed on final grade elevation, at request	1,400.00
Total extras claimed under verbal contract for second 100,000 cubic yards.....	$14,115.00

The total claimed by plaintiff from the defendants, for dirt furnished and work performed (including the extra 7,770 cubic yards), under the verbal contract for the second 100,000 cubic yards of fill, as previously mentioned is $24,813.60. Total claimed for extras outside of the specific work to be performed under the verbal contract for the second amount of fill over the first 100,000 totals as previously mentioned $14,115.00. Total claimed by plaintiff from defendants, relating to the contract relating to the fill under the first 100,000 cubic [R. 1057] yard total is $38,928.60.

Defendants claim there is nothing due on this to plaintiff.

The issues for the determination of the Jury may be briefly stated. There are four questions.

(1) Was there an assignment of the contract of January 21, 1966, to the plaintiff; that is, is Davidson Excavating, Inc., the real party in interest, and as such, entitled to sue the defendants in this action?

(2) What extras, if any, were performed outside of the contract of January 21, 1966, in connection with the first 100,000 cubic yards of fill dirt delivered by plaintiff to the defendants, and how much, if anything, is due to plaintiff from the defendants, for such extras.

(3) How much dirt fill was delivered by plaintiff to defendants after the first 100,000 cubic yards of fill dirt, and how much, if anything, is still due from defendants to plaintiff for the fill dirt delivered after the first 100,000 cubic yards of fill dirt.

(4) What extras, if any, were performed outside of the contract, whether verbal, or a continuation of the written contract of January 21, 1966, relating to the fill dirt after the first 100,000 cubic yards delivered by plaintiff to de-

fendants, and how much, if anything, is due to plaintiff from defendant, for such extras.

The Court charges you that if you find that the plaintiff [R. 1058] has established by a preponderance of the evidence that there was an assignment of the contract of January 21, 1966, to it, and that it is the real party in interest herein, then you will proceed to go into the other questions that the Court stated were for your consideration. However, if you find that the plaintiff Davidson Excavating, Inc., is not the real party in interest, then your verdict must be for the defendants.

The Court charges you as to the second question that if you find that the plaintiff has established by a preponderance of the evidence that in the supplying of the first 100,000 cubic yards of dirt fill, under the contract of January 21, 1966, there were extras or extra work and services performed by plaintiff for the defendants, outside of the contract, for which the plaintiff is entitled to be paid by the defendants under the rules of law previously given to you, then you will consider just what those extra things were. And you will then determine, from a preponderance of the evidence, the reasonable value of the services in question for which plaintiff is entitled to be paid by defendants.

If you have so found, then your verdict on this question would be in this amount for plaintiff against defendants.

If you find that the plaintiff has not established by a preponderance of the evidence that there were extras performed outside of the contract, of January 21, 1966, for which it is entitled to be paid by defendants, under the rules of law [R. 1059] previously given to you, then on this question, your verdict must be for the defendants.

As to the third question the Court charges you that if you find that the plaintiff has established by a preponder-

ance of the evidence that in the supplying of fill dirt over the first 100,000 cubic yards of fill dirt, that the plaintiff has not been pain in full for the amount of such fill dirt delivered, graded and compacted to the theater site, then you will determine the amount of fill dirt so delivered, graded and compacted over and beyond the first 100,000 yards so delivered, and then you will determine, from the preponderance of the evidence, the amount still due to the plaintiff from the defendants on this part of the claim of plaintiff.

If you have so found, then your verdict on this question will be in this amount for plaintiff against defendants.

If you find that the plaintiff has not established by a preponderance of the evidence that it delivered, graded and compacted more cubic tons of fill dirt over the first 100,000 than it has been paid for by the defendants, then on this question, your verdict must be for the defendants.

As to the fourth question the Court charges you that if you find that the plaintiff has established by a preponderance of the evidence that in the supplying of the fill dirt over the first 100,000 cubic tons, that there were extras or extra work and services performed by plaintiff for the defendants outside [R. 1060] of the contract, for which the plaintiff is entitled to be paid by the defendants, under the rules of law previously given to you, then you will consider just what those extra things were. And you will then determine, from a preponderance of the evidence, the reasonable value of the services in question for which plaintiff is entitled to be paid by defendants.

If you have so found, then your verdict on this question would be in this amount for plaintiff against defendants.

If you find that the plaintiff has not established by a preponderance of the evidence, that there were extras performed outside of the contract, whether verbal, or con-

tinuation of the written contract of January 21, 1966, for the fill dirt over the first 100,000 cubic yards, for which it is entitled to be paid by defendants, under the rules of law previously given to you, then on this question, your verdict must be for the defendants.

The Court charges you that if you find there is anything due to plaintiff from the defendants for the extras, as to the first 100,000 cubic yards of fill, that the plaintiff asks for interest on the sum from June 30, 1966. The legal rate of interest in Ohio is six percent per annum, or per year, and you shall add to the amount that you find due on this claim, the interest at six percent per year from June 30, 1966, to the date of your verdict and if you render it today, it is June 14, and the amount you find due and the interest shall be added together, the total making your finding as to the verdict upon this claim.

[R. 1061] The Court charges you that if you find there is anything due to plaintiff from the defendants for fill dirt over the first 100,000 cubic yards, or if you find that there is anything due to plaintiff from the defendants for extras, as to this second 100,000 and more cubic yards of fill, that the plaintiff asks for interest on the same from December 29, 1966 to the date of your verdict. The legal rate of interest is six percent per annum, or per year, and you shall add the amounts that you find due together, and then on this total you shall add to the amount so found due to plaintiff, the six percent interest thereon, from December 29, 1966, to the date of your verdict, which if today, is June 14, 1968. The amount that you find due, and the interest, so added together, makes your find as to the verdict upon these claims of the plaintiff.

If you find for the plaintiff, in your verdict herein, you will then add together the two amounts just before mentioned, that is, the amount found due for the extras on the

first 100,000 cubic yards of fill dirt, and the interest on this from June 30, 1966, to date of verdict and then the second amount, the amount that you find still due for fill dirt and for the extras after the first 100,000 cubic yards, with the interest on that sum from December 29, 1966, to date of verdict, and then this grand total is the amount that you write into your verdict form, as the amount due from defendants to plaintiff.

It is your duty to arrive at a verdict, upon which at least [R. 1062] nine of your members must agree. This is the Constitutional number in Ohio in civil cases. You will have in the jury room two forms of verdict, and no inference is to be drawn in which the Court reads these forms and explains them to you.

"We, the Jury, upon the issues joined between the parties, in this case, do find for the Plaintiff, Davidson Excavating, Inc., and find that there is due to Davidson Excavating, Inc. from the Defendants Levin Service Co., Sam Levin and Louis Levin the sum of ". . . there is a line for you to fill in in writing the amount you find due. Then there is a space for twelve signatures.

The other verdict form . . . "We, the Jury, upon the issues joined between the parties, in this case, do find for the Defendants, Sam Levin and Louis Levin" and a space for twelve signatures if you sign that form.

When you have reached a verdict, you will select and complete the form that corresponds with your decision. Those agreeing upon the verdict must sign the same in ink, and it is immaterial whether the Foreman is one of those agreeing, if the verdict is reached by nine, ten or eleven of your number.

There is also a special interrogatory which goes with the verdict form and will go with you to the jury room along with the exhibits.

Special Interrogatory Number 1 "Do you find that plaintiff is entitled to recover for any of the extra items it is claiming [R. 1063] over and above its claim for dirt delivered, and taking into account that defendants have paid for some extras? Answer yes or no." And this takes nine of your number if you agree upon that. You fill in the answer "yes or no" on that.

And the next Special Interrogatory . . . Number 2 . . ."If your answer to Special Interrogatory Number 1 is no, do not answer this interrogatory. If your answer to Special Interrogatory Number 1 is yes, as to what extra items do you find that plaintiff is entitled to recover, and in what amount as to each item?"

In the form that was typed and supplied to me there are only five lines there which may be sufficient. If you find there are more than five, you can draw a line and write the other item on the bottom. It says item and the amount and this also has space for twelve signatures and it takes nine of you to agree on that.

The Court cannot embody all the applicable law in any single part of these instructions. In considering any one portion of these instructions, you must consider it in the light of and in harmony with all other portions.

The Court has instructed you on all the law necessary for your deliberations. However, whether or not certain instructions are applicable may depend upon the conclusions you reach on the facts.

If you have an impression that the Court has indicated how [R. 1064] any disputed fact should be decided, you must put aside such impression because you, the jury, determine such matters.

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings and

to render your verdict accordingly. In fulfilling your duty as jurors, your efforts must be to arrive at a fair and just verdict.

Your initial conduct upon entering the jury room is a matter of importance. It is not wise immediately to express a determination to insist upon a certain verdict because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

Consult with one another, consider each others views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial to reach a verdict solely because of the opinion of other jurors.

I also want to caution the jury once more to decide this case on the evidence and the law as you heard it in the Court room and not be influenced by anything you have seen or heard [R. 1065] on TV in the way of fiction plays and things of that kind. You have taken your oath to decide this case upon the evidence and the law as presented to you here. That is your responsibility now.

After you retire, select a foreman or forelady, who will preside over your deliberations, and whenever at least nine of your twelve jurors agree upon a verdict and you must also agree upon these two interrogatories, you will sign the verdict and interrogatories upon which you have agreed, in ink, and you will advise by using the signal in the jury room, and you then be returned to the Court room.

The Court will place in your possession the exhibits. The Court will shortly review them for you.

We have a mutual exhibit . . . Exhibit AA . . . the contract for the first 100,000 cubic yards of January 21, 1966. Then, Exhibit 1 through 7 includes pictures, 8 through 12 includes pictures of the site then and now. Plaintiff's Exhibit 13 is the map up on the board, Plaintiff's 14 is the notebook of the first 100,000 cubic yards, Exhibit 15 is the green notebook; Exhibits 16, 17, 18, 19, 20 and 21 are all cards after January 21, going up to August 27, and we have Exhibit 19A which is two cards, Exhibit 22 are invoices for the first 100,000 cubic yards, Exhibit 23 are invoices after the first 100,000 cubic yards, Exhibit 24 is a page from accounts receivable records, Exhibit 25 is check stubs of remittance from Levins, Exhibit 31 cards, [R. 1066] Exhibit 38 is a topo map, Exhibit 39, calcium chloride invoice, Exhibit 40, 41 and 42, Hackett's interim survey totals in a letter, I think; Exhibit 43 is a topo map, Exhibit 44 is a sheet written by Nancy Barton in the Court room, Exhibit 45 is a topo map plan of the theater.

We have a number of exhibits for the defendant. B and C are bills for water, D .... two sheets of paper; E is an invoice, F is a piece of paper by Mrs. Reed, G is a topo map, H is a graphic representation by an engineer, Exhibit I, J, and K are letters or something transmitting the results of the surveys of Graf Service Company . . . Engineering Company, Exhibit L is a worksheet, Exhibit M is a total of the survey of July, Exhibit N is a pen of Nancy Barton, O is a yellow sheet that Nancy Barton wrote upon, P is a photostatic copy of five pages of Exhibit 15 . . . the green notebook.

These will all go with you to the jury room along with

the special instructions I gave you and the two verdict forms and the two interrogatories.

The Court will place these in your possession and the foreman or forelady will retain possession of these records and return them to the Courtroom. Until your verdict is disclosed in open Court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

On behalf of the public and the parties, the Court expresses appreciation for your services in performing this important [R. 1067] public function.

After your verdict is returned and your jury services are completed, you may discuss this case with anyone, but you are not required to do so. Whether you discuss this case with anyone or with counsel, or the press, after you are discharged, is a matter of your own free choice. Anything further from counsel?

MR. ALEXANDER: No, Your Honor.

MR. BRIDGE: One question, please. Defendant requests the Court to charge that insofar as plaintiff is relying on the theory of reasonable value or quantum meruit, the jury be instructed as a part of that proof it must establish by a preponderance of the evidence that the plaintiff intended to charge for the work at the time the work was done.

THE COURT: I did say that in my general charge. Counsel have requested me to clarify a remark as to the charges for the extras. A person performing the extras in order to make a valid claim must have intended on receiving payment for them at the time he performed them if they were extras. In other words, you cannot do them gratuitously as a gift and later turn around and change your mind and charge. That is the law and I think I

covered it pretty well. He wanted me to call it to your attention again.

Anything further?

MR. ALEXANDER: No sir.

MR. BRIDGE: That is all, Your Honor, thank you.

[R. 1068] THE COURT: Very well.

We have a thirteenth juror and we never know what we are going to do with the thirteenth juror. Our Judge in the Federal District Court related a circumstance where a thirteenth juror had been completely discharged and he had left the Court House while getting up the exhibits any everything to go to the jury room and the twelve others had just gone into the jury room and one of the men had a very bad heart attack and they had to call the doctor and, of course, that ended the case absolutely as only eleven were left to deliberate because the thirteenth had been discharged.

I am going to allow you to leave but you are still a member of the jury until the twelve bring in a verdict and if anything happens to any of the twelve, which I hope will not, we might have to send for you and bring you back to join in the deliberations.

I want to thank you very much for sitting here for nine and a half days and listening to this when you don't get to go to the jury room and deliberate with them. But, we hope that you have learned something about Court and the duties of Court and the lawyers and counsel and the fact that Courts are for the determination of questions between parties. I trust you have enjoyed your service and as soon as the doors close on these twelve in there then you are free to leave the Court House.

Mr. Bailiff, you may take the exhibits and forms and [R. 1069] everything to the jury room. Special charges,

we have two verdict forms and two interrogatories and those two boxes.

Thank you.

(Thereupon, the jury retired to the jury room for deliberation.)

(Thereupon, the buzzer sounded and the jury was returned to the Court room and was seated in the box.)

THE COURT: Mr. Foreman, I understand you have a verdict?

MR. SINCLAIR: Yes sir, Your Honor.

THE COURT: I am going to ask you to go back and fill in what you say here on this Special Interrogatory Number 2 where it says Item 3, Item 5 and 6, would you write in what those items are.

MR. SINCLAIR: There was not room on the paper, Your Honor.

THE COURT: You can refer to some words of some kind. Go back and fill that in.

MR. SINCLAIR: You need the exhibit. The one exhibit attached to the paper.

THE COURT: I did not see that, yes, here it it. Is this the one you mean?

MR. SINCLAIR: Written in pencil on the exhibit.

THE COURT: Are you willing to accept that instead of writing it out in full?

MR. BRIDGE: If they are correlated.

THE COURT: Yes, there is a correlation.

MR. BRIDGE: I think the Court should identify what is done.

EXCERPT FROM A BRIEF FILED IN THE OHIO COURT OF APPEALS

III. JOINT LIABILITY HAS NOT BEEN ESTABLISHED

As pointed out at *11 O. Jur. 2d 424, Contracts, Section 174*, "A joint promise binds all the promisors for the entire debt." *At 11 O. Jur. 2d 423, Contracts, Section 173*, such "joint promise" is defined thusly:

> "A joint promise is a promise made by two or more persons to perform the same act."

The plaintiff has neither in its pleadings nor in its proof made any endeavor whatsoever to make any distinction at all as to either the extent or theory of liability among the three captioned defendants. Nor at any time throughout the trial did the plaintiff ever see fit to make any election whatsoever as to which among the three defendants it was holding responsible and for what and for how much it was looking to that particular defendant. Instead, the plaintiff has chosen to look to all three defendants for the whole. In so doing, the plaintiff has taken upon itself the unenviable burden of establishing that as to each and every aspect of the claim, that each and every of the three defendants was a principal-participant or at the very least a principal-beneficiary.

In order to sustain this burden it was incumbent upon the plaintiff to establish that whenever Louis Levin was acting that he was acting for himself as a principal and also as the duly authorized agent for Sam Levin and also as a duly authorized agent for Levin Service Co., AND ALL AT ONE AND THE SAME TIME AND EVERY TIME.

This the plaintiff did not prove or even endeavor to prove. Similarly, whenever the plaintiff was endeavoring to establish its proof by the acts of Sam Levin, it was incumbent upon the plaintiff to establish that whenever Sam Levin acted, that he was acting not only for himself as a principal, but also as the duly authorized agent for Louis Levin, and also as a duly authorized agent for Levin Service Co., and again all at one and the same time and every time. The record is wholly devoid of any such proof.

The verdict which has been returned in this case, having been returned jointly against all three defendants as to and for each and every dollar of that verdict, is contrary to law. The verdict is impossible in its present posture, and one not susceptible of apportionment. Nor was there even sufficient evidence before the jury by which it could have lawfully apportioned its verdict had it so desired and had it been given the opportunity. Even if for argument's sake we were to take the benefit theory, Louis Levin and Sam Levin received none of the benefit for the dirt, since the contract had been assigned to Sheridan Theatre, Inc. Even if we were to go behind that assignment, the extent of Sam Levin's benefit would be only his undivided one-third tenant-in-common interest. Likewise, the extent of Louis Levin's liability would be only to his undivided one-third tenant-in-common interest. Moreover, under no theory may Louis Levin be properly charged for the additional fifty to sixty thousand cubic yards of dirt that were added for drainage, to the addition of which Louis Levin expressly objected. It was plaintiff's own witnesses, Davidson and Davis, who expressly testified that Louis Levin objected to such additional yardage in their presence and in the presence of Sam Levin, who they alleged approved it, notwithstanding Louis Levin's objection. It is clear that any apportionment in a case such as this can only be made

by the jury, and only if there is sufficient evidence to permit apportionment. There is simply no evidence which has been introduced in this case to show that the verdict could in any way have been apportioned by the jury, and certainly there is no basis for any such apportionment by the Court.

The applicable Ohio statues which make impossible any modification of this verdict at this time are *Sections 2315.10 and 2315.11, Ohio Revised Code.* See also *Merriman* v. *Hartfile,* 112 Ohio App. 155. Going beyond Ohio, the Court's attention is respectfully directed to *Loomis* v. *Perkins,* 70 Conn. 444, a reproduced copy of which is appended hereto and made a part hereof. In the *Perkins case;* a joint judgment was granted against a father and son for the work performed allegedly for the defendants. The trial court set aside the jury verdict, and was sustained on appeal, for the reason that there was no evidence showing a joint contract by the defendants to pay the plaintiff for his services, nor was there evidence to show that the defendants were partners, therefore creating a joint liability. There was no evidence in the case to the effect that the defendants were partners, and therefore there existed no joint liability in order to sustain a joint verdict, and it was therefore properly set aside. See also *Russell Grain Company* v. *Chicago Great Western Rail Company, et al.,* 237 S.W. 195, 208 Mo. App. 485, a reproduced copy of which is appended hereto, where an action was brought by a consignee against two separate railroads for a delay in delivery, and a general verdict was entered for the Plaintiff against both Defendants. It was held that this verdict was insufficient, and therefore the case was reversed. The actions of the Defendants were not joint nor joint and several, but rather several and exclusive, and therefore a

joint verdict was an impossibility. See also *Connelly* v. *Railroad*, 169 Mo. App. 272, 281; 153 S.W. 79.

The verdict in this case is not susceptible to correction by modification not only because of its form and substance, but for its very illegality. The proposition is stated thusly at 4 O. Jur. 2d 591; Appellate Review, Section 1215, to-wit:

> "But a joint judgment rendered against defendants improperly joined must be reversed on review as an entirely if reversed at all, and cannot be affirmed as to part and reversed as to part.";

and as stated at *31 O. Jur 2d 670; Judgments, Section 213*, "A judgment . . . is an 'indivisible unit'; and there are frequent statements in the reports that a 'judgment is an entirety'." The plaintiff having elicted no testimony which would permit the jury or the court to apportion the damages between the individual defendants, and since the burden is upon the plaintiff in this case to show which of said individuals, if any, owed money to the plaintiff and how much that particular individual owed, and since this was not done, said individuals as a matter of law are entitled to judgment in their favor. In any event, the least that the Court is required to do in this case is to grant a new trial for these defendants.

SUPREME COURT, U.S.
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Case No. 71-160

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LEVIN SERVICE CO., et al.,
Petitioners,

v.

DAVIDSON EXCAVATING, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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STATEMENT OF THE CASE

The Respondent submits the following "statement of the case" because the one submitted by Petitioners contains many conclusions which are dependent upon the view one decides to take about various disputed matters.

This law suit started because of a dispute between the parties as to how much material was provided and how much work was performed by the Respondent in constructing the site for a drive-in theatre near Cincinnati, Ohio. The original petition filed by Respondent was against all three Petitioners and claimed Twenty-Four Thousand Eight Hundred Thirteen and 60/100 Dollars ($24,813.60) for materials delivered to the site and Twenty-Five Thousand Four Hundred Thirty Dollars ($25,430.00) for grading and engineering services. The Petitioners denied that they owed anything.

It is undisputed that a written agreement was signed by Claude Davidson and Sam Levin that formed the basis for the first work done on a cornfield near Cincinnati, Ohio, in January, 1966. Controversies arose between the various parties almost immediately. A haul road had to be built so that trucks could drive from the highway to the area where the theatre was to be built. The location of the screen was changed several times. The work was not completed until August, 1966. Conflicting arguments have been made by all of the parties as to what developed during this eight month period of time.

The Petitioners have maintained that the quantity of fill dirt delivered to the site was to be determined by engineering surveys. The Respondent has maintained that this method was agreed upon at the start, used for a while, and then changed to one which called for an actual count to be maintained of truck loads delivered to the site. Likewise, disputes arose as to whether or not the Respondent performed certain duties at the request of the Petitioners in addition to the delivery of fill dirt.

The case was tried to a jury for two weeks. Both sides exerted every effort to establish the validity of their positions. A great deal of time and effort was devoted to the kinds of records maintained and to their accuracy as well as to the accuracy of various engineering surveys. At no time did any of the Petitioners move for an election to be made by the Respondent as to which of the Petitioners it was proceeding against.

The jury was charged upon all the issues made by the pleadings and returned a unanimous verdict for the Respondent in the sum of Thirty-Five Thousand Eighty-Eight and 65/100 Dollars ($35,088.65) against all three Petitioners. Interrogatories were answered by the jury which indicated that this verdict was based upon the full amount

being claimed for materials and certain itemized portions of the claims for labor.

Motions were filed by the Petitioners for judgment notwithstanding the verdict and for a new trial. One of the grounds urged by the Petitioners was that there was no basis for joint liability upon the part of the three original Defendants. These motions were considered by the trial court and overruled.

An appeal was taken to the Court of Appeals for Montgomery County and the judgment was reduced by Eight Thousand Three Hundred Fifty-Four and 44/100 Dollars ($8,354.44). This was the amount awarded by the jury for work performed beyond the value of the material delivered. This reduction was ordered because the evidence failed to show an intention to make a charge for these services at the time they were performed.

A motion for reconsideration was filed by Petitioners and was overruled.

Petitioners then filed a motion to certify the record in the Supreme Court of Ohio which was denied. A petition for rehearing was also denied.

Petitioners are now seeking to have this Court accept this case for review on the ground that they have been deprived of their right to due process of law.

ARGUMENT OPPOSING JURISDICTION

It is fundamental that the presence of a real and substantial federal question is essential to the jurisdiction of the Supreme Court of the United States over a judgment of the state courts.

Honeyman v. *Hanan,* 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350

California Water Service Co. v. *Redding,* 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865

Petitioners argue in their brief that a federal question is presented here because the Ohio Court of Appeals used some language in its opinion that supported the finding of the trial court and also made a reference to "joint enterprise". They argue that this use of the words "joint enterprise" injected a new issue or theory into the case upon which the jury had not been charged.

We submit that this was not a new issue. The pleadings established that Respondent had filed suit against the three Petitioners. During the trial there was testimony from both Sam Levin and Louis Levin as to the roles they played in connection with this project as well as the offices they held in Levin Service Co. The Court of Appeals reviewed the entire record and pointed out (P. 24, Appendix, Brief of Petitioners) that there was testimony to support a finding that Sam Levin, Louis Levin and Levin Service Co. were jointly involved and were jointly liable.

Petitioners are attempting to put great stress upon the use of the words "joint enterprise" in the opinion of the Ohio Appellate Court. This seems to be an effort to manufacture an excuse for a further appeal of this case after every avenue has been used within the State of Ohio. It is without substance or foundation. The case has been fairly tried and appeals have been processed at every level available and at every level the Petitioners raised the issue of mutual joint liability. The state courts have consistently denied the arguments of the Petitioners.

This court has consistently held that it will not review judgments of state courts which rest upon adequate and independent grounds or non-federal grounds.

32 Am. Jur. (2) Federal Practice & Procedure #242

Herb v. *Pitcairn*, 324 U.S. 117, 89 L.Ed. 789, 65 S. Ct. 459

Holley v. *Lawrence*, 317 U.S. 518, 87 L. Ed. 434, 63 S. Ct. 394

CONCLUSION

The Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT C. ALEXANDER
Attorney for Respondent

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Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's "Statement of the Case", through its choice of terms, appears to give the misleading impression that it delivered various building materials for the construction of a theatre site.

In fact, it simply delivered and dumped only one item, fill-dirt, on a field.

Respondent's statement that controversies arose almost immediately is also misleading and not supported by the record. No controversies arose until the very end of the job, when Respondent refused to accept the results of an engineering survey which determined that 173,000 yards of fill-dirt had been delivered. This is borne out by the

record which shows that all bills were hand-presented by Respondents, under claim of pressing financial obligations, and were paid promptly, on each occasion up to the final phase of the job. Only when Respondents demanded payment for alleged delivery of fill-dirt in excess of that found to have been delivered by the engineering survey, was payment refused, and the controversy arose.

Although the written contract provided that measurement of the number of cubic yards of fill-dirt delivered was to be determined by engineering survey, Respondents refused to accept the results of the final survey by the registered engineers. Respondent thereupon employed its own engineer to make the survey at the conclusion of the job. It refused to reveal the results of this survey.

Thus the controversy came to a head.

Respondent thereupon filed suit, claiming payment due for 34,000 yards of fill-dirt in excess of that shown to have been delivered by the engineering survey. It did not claim the engineering survey was in error. Instead, it claimed for the first time that the engineering survey was no longer applicable. It is significant that this claim was first made only after consulting with their legal counsel following the conclusion of the work. It claimed after such consultation, that the survey method of measurement (under the written contract) had been superseded by an oral agreement, which determined the amount of fill-dirt delivered, by merely counting the truck deliveries, by its own employees.

No billings were ever made by the number of truck deliveries, nor was there any change in the method of billings, from the inception of the work to its conclusion, to indicate any such change.

The survey method of measurement also was employed from the inception of the job, to its conclusion. The final

results of the survey were checked by Respondent's own engineer, who declined to disclose his results at the trial.

Nevertheless, the jury disregarded the results of the survey by the registered engineers, and brought in a verdict for 34,000 more cubic yards of fill-dirt than that shown to have been delivered by the engineering survey.

The verdict was against Sam Levin, Louis Levin and Levin Service Co., jointly and not severally. The only party to the written agreement was Sam Levin, individually, who was an officer of Sheridan Theatre, Inc., the owner of the theatre.

Louis Levin was an officer of Sheridan Theatre Inc., the corporate owner, and was supervising the work for the owner. There was no evidence to the contrary. He had no monetary investment or interest in the theatre, or its construction. He received a salary from the owner, Sheridan Theatre Inc.

Levin Service Co. was an accounting firm which was employed to do accounting work for the owner, Sheridan Theatre Inc. It issued its checks on behalf of Sheridan Theatre Inc., for which it was reimbursed. It had no other nexus to the work. It was not a party to the contract, and had no investment or interest in the construction of the theatre or the land.

The Court of Appeals was unable to find joint liability on the part of Levin Service Co. or Louis Levin as joint principals or as partners.

It did so only by adopting a theory of "joint enterprise" to hold them liable. The jury was not charged upon this theory of liability, nor was such ground of liability pleaded. It was not submitted or argued by either party in their briefs to the Ohio Court of Appeals, nor orally argued in the Ohio Court of Appeals. It has never been defined by the Ohio Supreme Court.

REPLY TO RESPONDENT'S ARGUMENT OPPOSING JURISDICTION

The authority cited by the Ohio Court of Appeals to support its theory of "Joint Enterprise", is in fact contrary to its holding. This authority, 31 Ohio Jurisprudence 2d 317-331, Joint Adventures, Sec. 1-15, states that this theory (Joint Enterprise) is not normally employed in reference to a business relationship comparable to a partnership. It has been defined as an undertaking for the mutual benefit or pleasure of the parties, as a result of which the negligence of one participant may be implied to another. 30 American Jurisprudence 940, Joint Adventures, Sec. 2.

The Court of Appeals declined to define this theory of liability, and instead, in its opinion, referred the reader to an entire chapter of 31 Ohio Jurisprudence, 317-331, Joint Adventures, Sec. 1-15.

Respondents argue that Petitioners were not denied due process of law even though the jury was not charged on the doctrine of "joint enterprise" under which theory alone the Court of Appeals found joint liability to rest. It also argues that Petitioners were not denied due process of law, even though no such theory of liability was pleaded. It ignores the fact that no such theory of liability was argued in the Court of Appeals, nor defined by the Supreme Court of Ohio, it argues that the theory of mutual joint liability was upheld, but it ignores the fact that it was upheld under a theory of "Joint Enterprise" upon which the jury was not charged.

Respondent argues that the Court of Appeals found ample evidence that Louis Levin and Levin Service Co. were "*jointly involved*" and therefore jointly liable.

The Court of Appeals found that the "joint involvement" referred to by Respondents was not sufficient to constitute

joint liability except under a theory of "Joint Enterprise" which it adopted for the first time. This doctrine was supported by citation to a whole chapter of a law digest.

We quote the language of the Court of Appeals,

> "Under the circumstances shown here, we conclude that the trial court correctly determined that Levin Service Co., Louis Levin and Sam Levin were engaged in a joint enterprise as that term is described in 31 Ohio Jurisprudence 2d, 317-331, Joint Adventures, Section 1-15."

This language is found at page 25, Appendix Petitioners Brief for Writ of Certiorari.

The language found in the above paragraph that "the trial court correctly determined that Levin Service Co., Louis Levin and Sam Levin were engaged in a joint enterprise" is unfortunately without foundation. The verdict was by a jury, not by the trial court. The only opinion rendered by the trial court occurred in overruling petitioner's motion for a new trial, and for judgment notwithstanding the verdict. No such language or theory appeared therein, nor was this theory of liability pleaded. See Appendix, pages 17-19 of Petitioner's Brief for Writ of Certiorari, for this opinion.

The jury was not instructed in any manner on this theory by the trial court, nor were any such instructions submitted by either side.

This theory of liability appeared nowhere in the briefs of either side, filed with the Court of Appeals. It adopted this theory without requesting briefs or argument, by either side. Further, the law digest to which it referred to justify its use of the theory, [to find joint liability] holds that it is properly employed solely in negligence actions and is inapplicable to contract liability.

Respondent's sole argument on this issue is by way of character assassination. He argues that the raising of the issue of denial of due process herein, is the "manufacture (of) an excuse for a further appeal of this case" after the denial of the appeal [without hearing] by the Supreme Court of Ohio.

We submit this is hardly an argument befitting a brief to this court. Respondent is entirely silent and submits no argument on the question of the "joint enterprise" doctrine adopted by the Court of Appeals to sustain the verdict of joint liability, and resorts solely to an attack on the character of petitioners counsel, by claiming the appeal is "a manufactured excuse" to appeal this cause.

CONCLUSION

It is undeniable that Petitioners were denied their right to a fair trial under due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. It is fundamental that a trial by jury requires that the jury be instructed on the issues under which Petitioners liability was found to exist. This was not done here.

We submit that due process of law requires that Petitioners be given notice under the pleadings so that it may make every proper defense. This was not done here. The pleadings did not allege in any manner a claim of liability by reason of an allegation of joint enterprise.

We submit that due process of law is denied, where on appeal, a new theory of liability (joint enterprise) is employed by the Court of Appeals to sustain the liability of petitioners, which under the pleadings and trial pursuant thereto, petitioners were not called upon to meet

in the trial court. *Virginia Railway Co.* v. *A. J. Mullen,* 271 O.S. 220, 70 L. Ed. 915, 46 S. Ct. 526 (1926).

We respectfully submit this cause should be remanded to the Supreme Court of Ohio for a hearing and opinion on the issue of the denial of due process of law, under a theory of liability never defined by that court in a contract action. The Ohio Supreme Court rendered no opinion, and refused jurisdiction on the ground that no substantial constitutional question existed.

Certainly the rights of petitioners under the Fourteenth Amendment to the Federal Constitution should not be disregarded and trampled upon by reason of the press of other matters considered to be more important on the docket of the court below.

The injustice here is patent. The Constitutional safeguards of the Fourteenth Amendment of a trial by jury under due process of law should not be permitted to be ignored by the highest State Courts below.

Respectfully Submitted,

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